



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

DIRECT LEGISLATION

AND ITS PROSPECTS IN THE UNITED STATES

IN the course of his inaugural address to the legislature of Massachusetts in January, Governor Douglas, the newly-elected Democratic governor of an admittedly Republican state, made certain suggestions for legislation which are of national interest. He stated it to be his opinion that Massachusetts industries are suffering from the present protective tariff, and he urged the legislature to appoint a commission to consider the effect of the tariff upon the prosperity of the commonwealth. He then suggested that the commission "should consider the advisability of a referendum vote on one or more of its conclusions, the primary object of such vote being to obtain an expression of opinion from the people for the information and guidance of our representatives in the Congress." The widespread sympathy which greeted this proposition demonstrated how deeply the sentiment in favor of a more active participation by the people in law making has manifested itself in the United States.

It is now ten years since the demand first began to be heard, from various parts of the nation, that a voter's franchise should not be confined to making a selection among candidates for public office, but should also include an opportunity to pass judgment upon questions of legislative policy and to approve or veto legislative enactments by voting for or against their confirmation. This desire for the so-called initiative and referendum is due in part to descriptions of the successful government of Switzerland by direct legislation, in part to a growing distrust of our representative system of government, as illustrated by our state legislatures and city councils, and in part to the labor unions. The workingmen have seen that if laws are to be enacted by the submission of measures to the voters at the polls, their organizations will give them opportunities for

concerted action, and they may become an important factor in political life. It has found expression in magazine articles and books upon the referendum, in "direct legislation leagues," and in amendments to the constitutions of Utah, South Dakota Oregon and Missouri. It is apparently not too much to say that the great majority of political reformers turn to direct legislation in some form as a necessary part of their programmes. The present governor of Massachusetts, for example, followed up the suggestion in his inaugural address, which is quoted above, with a recommendation for legislation which would permit the people of the state to veto or approve not only the statutes passed by the legislature, but also all actions of the city councils in the various municipalities.

Though the subject is one which is familiar to all students of government and to the members of most legislative bodies, the arguments for and against direct legislation and the debates upon bills affecting it have almost invariably been founded upon its theoretical appropriateness or inapplicability to the American system of government. It is true that attention is constantly called to the Swiss experiences with the initiative and referendum by those who endorse and also by those who oppose the principle of direct legislation, but it is generally admitted by both sides that the social and economic conditions of the Swiss cantons and the Swiss conception of popular government are so radically different from American life and government that the facts concerning the history of Switzerland can have only a general and theoretical bearing upon practical legislative problems in America.

The time-honored argument of the advocates of direct legislation in this country is Rousseau's text, that as the government is founded upon the acquiescence of the governed no principle can be wrong which brings law making closer to the people. The stereotyped reply of the conservative believer in representation is that direct participation by the people in legislation is inconsistent with the continued existence of the American principle of departments of government; that it would render the veto of the executive ineffective; that the function of the supreme court to pass upon the constitutionality

of laws would be destroyed; that through it the whole trusted fabric of checks and balances would be distorted. The time seems now to have come, however, when the question of the further extension of direct legislation in America may be argued from actual experience—not the experience of foreign countries but the experience of American states which have adopted it in some form and whose citizens now directly participate in law making. What are the actual results which direct legislation has accomplished in the last ten years?

There are three forms, generally speaking, in which a legislative measure may come directly before a voter. It may come before him, in the first place, under the general provisions of the constitution of a state which has accepted the initiative and referendum as part of its regular legislative machinery. This is the way it would come to-day to a voter in Oregon. Secondly, it may come to him under an act of a legislature when the opinion of the people is desired upon a special proposition, as the governor of Massachusetts to-day desires the opinion of the people of that state on the tariff question. Thirdly, a voter may be asked whether he desires the provisions of a law already passed by the legislature to apply to the community in which he lives. Thus under the terms of a general law controlling the sale of liquor in cities and towns, a citizen may have the right to express on his ballot his opinion whether any liquor shall be sold in the municipality in which he lives. This local option is not, accurately speaking, direct legislation, for it is the application of the law to a certain place and not the enactment of a law which is before the voters. Inasmuch, however, as it involves the expression of opinion by the voter on a measure and not on a candidate, the lessons to be derived from this form of referendum are well worthy of consideration.

Are there then lessons to be learned from the experience of the states of Utah, South Dakota, Oregon and Missouri which have incorporated the initiative and referendum into their legislative machinery? The constitutional amendment of South Dakota, passed in 1897, is as follows:

SECTION 2. The legislative power of the state shall be vested in a legislature, which shall consist of a senate and house of representatives, except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect (except such laws as may be necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions).

Provided, That not more than five per centum of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

This section shall not be construed so as to deprive the legislature or any member thereof of the right to propose any measure. The veto power of the executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by vote of the electors of the state shall be, "Be it enacted by the people of South Dakota." The legislature shall make suitable provisions for carrying into effect the provisions of this section.

The amendment to the constitution of Utah passed in 1899 and that of Oregon passed in 1901 give to the citizens of those states the same general powers that are given to the voters of South Dakota, except that in Utah there may be no reference of a statute to the people "if it has been passed by a majority of two-thirds in both houses of the legislature"; and Oregon excepts from the operation of the referendum "laws necessary for the immediate preservation of the public peace, health and safety." The Missouri provision is practically similar. Strange as it may seem, the amendments appear to have had as yet little effect on legislation in any of the four states. In 1899 out of a total of 127 statutes passed by the legislature of South Dakota, 64 were passed under the emergency clause, in 1901, 81 out of a total of 186 acts, and in 1905, 85 out of 177 acts were so passed. To practically every matter of popular or political interest the emergency rider has been hitched. No acts have been submitted to the people. In Utah the legislature refused to pass the legislation necessary to carry the policy of the

initiative and referendum into effect. The only result in Missouri is that this year many acts were passed under the "emergency clause." In Oregon the necessary law to carry out the initiative and referendum was enacted in 1903, and in June, 1904, a local option law was passed by a popular vote of 56,285 to 16,354 and a direct primary act by a vote of 43,316 to 40,198. Of the 99,315 persons who were present at the polls, 15,801 did not vote on the local option bill and 26,586 did not take sufficient interest to pass on the direct primary measure. It is an interesting coincidence that at the very time when the people of Oregon were passing their direct primary law, the people of Massachusetts were, as we shall see, petitioning the state legislature to find some method to repeal a direct primary law which during the previous year had been adopted by the voters of Massachusetts by a referendum vote.

The result apparently is that, in spite of the reservation to the public of the broadest possible powers compatible with public safety, the voters of three of these states either are satisfied that their legislators are doing their work properly or (what seems more probable) do not care to take the trouble to interfere or are powerless, with all the machinery of direct legislation in their hands, to restrain legislative action.

The history of general referenda on special propositions upon which the legislative body desires the opinion of the people gives more positive results. The example of this form of referendum which is most striking in the number of voters to whom a single question was addressed, and in the vastness of the territory to which it applied, is the case of the poll of all the voters of the Dominion of Canada in 1898 on the subject of prohibition. To the question: "Are you in favor of passing an act prohibiting the manufacture or sale of spirits, wine or beer within the limits of the Dominion of Canada?" the voter was to reply "yes" or "no" on the ballot. The legislature asked the question only in a consultative way, not binding itself to any course as a result of the vote. "This election," says Mr. Oberholtzer in his book, *The Referendum in America*, "cost the Dominion of Canada about \$300,000, and although there was a small majority on the face of the returns in favor

of prohibition, less than thirty per cent of those entitled to vote went to the polls." A Canadian correspondent wrote to the New York *Evening Post*, on the day after the election, as follows :

In some cases half the electorate polled, but these were exceptions. From one-fourth to one-third was a more common proportion, and in some districts it fell as low as one-eighth. Many of those who did vote seemed to wander into the polling stations more by accident than by set purpose.¹

An example of the expression of popular opinion upon a legislative problem of a rather different character occurred at nearly the same date in Massachusetts. At the time of the building of the Boston subway, the question arose in the legislature whether surface car tracks on Tremont Street, the street under which the subway was built, should be removed. The legislature submitted the question to the voters of the city at an election held December 12, 1899. The result of the vote was 26,166 in favor of retaining the tracks to 51,643 against it. 25,066 failed to vote. Seventy-five per cent of all the voters, therefore, expressed themselves on this question—a very substantial poll, which showed an active interest by the people of Boston in the question and gave a decisive answer to it.

But that such an interest in the legislative propositions which are put before them is not always taken by the people of Massachusetts at large appears from the following table of the votes cast in the last ten years upon proposed amendments to the state constitution :

¹ " At the city election in Chicago in April, 1904, the question of immediate municipal ownership of the street railways was voted on, under the Public Policy law. The affirmative vote was 121,957; negative, 50,807; the total vote cast being 236,000 out of a registration of 400,000. Yet on this vote the loud and persistent claim has since been made that the council should 'obey the will of the people' and proceed to acquire the street-railway properties, in the face of the absolute impossibility of its doing so on account of complex litigation and financial incapacity.

The Public Policy law is useless and mischievous. It is deceptive in its objects and results, and used as a weapon by agitators." W. H. Brown, *American Journal of Sociology*, May, 1905.

PROPOSAL	YES	NO	NOT VOTING
No person to be disqualified from voting because of a change of residence until after six months, <i>etc.</i> (art. xxx), Nov. 4, 1890..	97,177	44,686	235,837
Amendment of art. xxviii (art. xxxi), Nov. 4, 1890	100,109	27,021	250,570
So much of art. iii annulled as makes the payment of a poll-tax prerequisite for voting (art. xxxii), Nov. 3, 1891	144,931	53,554	195,749
A majority of each branch of the General Court to constitute a quorum, <i>etc.</i> (art. xxxiii), Nov. 3, 1891	152,688	29,590	211,956
Property qualification of governor annulled (art. xxxiv), Nov. 8, 1892	141,321	68,045	243,069
Clause relative to payment of traveling expenses of representatives annulled (art. xxxv), Nov. 7, 1893	125,375	80,855	248,525
So much of art. xix as is contained in the words "commissioners of insolvency" annulled (art. xxxvi), Nov. 6, 1894	114,499	34,741	304,961
Biennial elections (art. i), Nov. 3, 1896	115,505	161,263	210,833
Biennial elections (art. ii), Nov. 3, 1896	105,589	156,211	225,801

A conclusion from these examples seems to be that on matters of immediate and local interest voters will take the trouble to express themselves at the polls, but upon more general propositions they feel less interest and so little personal responsibility that usually less than a majority vote at all.

This tendency to vote upon questions which are familiar to the voter and to slight or neglect the problems which need thought or study is apparent in the third class of referenda—those cases in which the question is one of the application of a general law to a single municipality. Thus the question: "Shall licenses be issued for the sale of intoxicating liquors in this city or town?" is one upon which every citizen of Massachusetts passes each year. The question to many citizens presents a moral issue in addition to the business policy involved. We find consequently in the city of Cambridge that in 1903 out of 15,344 persons who voted at the city election all but 1,418 voted on the license question. In 1902 out of 14,053 who voted at the city election all but 1,142 expressed themselves on this subject. In Boston a larger percentage of voters pass upon the liquor license question than upon almost any other issue which comes before them except the choice of

candidates. The local option law in Massachusetts may, therefore, be called an unqualified success.

As often, on the other hand, as a proposition is put to the voters of the commonwealth which involves a decision upon a subject with which they are not already familiar, the result is unsatisfactory in the extreme. A remarkable illustration of the incompetency of the voters at large in Massachusetts to grasp a new question, although it was a very simple one, occurred within the past year. An amendment to the constitution, not so sweeping as those in the four western states already mentioned but having in view the same general purposes, was approved by the legislature in 1903. By a provision of the Massachusetts constitution proposed amendments to it must be passed by two legislatures and must then be accepted by the people. This proposition for direct legislation came, therefore, before the legislature of 1904. Its friends confidently believed that it would pass the legislature a second time by an overwhelming vote. It probably would have done so had it not been blocked by an unexpected obstacle.

At the election just previous to the convening of the state legislature all voters, with the exception of the citizens of Boston, had found upon their ballots the question: "Shall an act passed by the general court in the year 1903, entitled 'An act to provide for joint caucuses or primaries of all political and municipal parties,' be accepted?" The reason for presenting this question to the people of the state was as follows. For some years there had been complaints from cities throughout the state that the caucuses of the various political parties were sources of corruption. It was said that the same men voted in the caucuses of two different parties. It was maintained that the old fashioned caucus was out of date in these days of modern political methods. A statute known as the "Luce law" had been passed, therefore, by the legislature of 1903. This statute provided that the caucuses of all parties should be held at the same time in the same room and should be presided over by the duly appointed election day officials. In formality and in cost the caucus was to be like an election. A voter was to come to it and vote at it just as if it were an election, except

that he declared his political faith at the rail and received a ballot containing the names of those persons only who sought nomination from his party. It was felt by the legislature, however, that such a change in the method of choosing candidates for office ought not to be forced upon the voters of the state against their will. The new law involved an expense which was considerable for country towns, and it did away with the traditional methods of choosing candidates for political offices. Thus while the opportunity should be given to those communities which really needed that protection of publicity in the caucus which ordinarily accompanies an election, it was believed that those which were contented with the old system should be let alone. As the change affected all voters, as the reason for the new law was easy to understand and as a voter's political opinion or party was not expected to affect his decision, it seemed to be a peculiarly fit measure to submit to each community for acceptance or rejection by popular vote. To Boston alone the law was to apply whether the people wanted it or not. The provisions of the new law were accepted by 21 out of the 33 cities in the state and by 127 out of the 320 towns.

The morning after election the Luce act was hailed as the long-sought panacea for municipal corruption. A second glance at the record of votes cast, however, showed that the popular demand for the new law had been overestimated. In only a very few cases had half of the voters of the community cared to register themselves either for or against the proposition. In many cases not half of those voting for candidates voted upon this question. In Worcester, out of 36,247 registered voters, of whom 22,014 voted at the election, the law was adopted by a vote of 4921 to 4558. The following is a list of the vote of the ten largest cities and of twenty-five typical towns upon the question:

	TOTAL REGISTERED VOTERS	VOTING AT THE ELECTION	VOTING ON LUCE ACT	
			YES	NO
BROCKTON	9,106	7,044	1,944	1,861
CAMBRIDGE	16,151	13,301	4,068	3,598
FALL RIVER	15,205	11,263	2,881	5,521
LAWRENCE	11,131	9,223	3,829	2,305
LOWELL	15,254	12,824	6,203	2,786
LYNN	13,894	10,762	4,389	2,240
NEW BEDFORD	9,317	7,207	2,409	1,769
SPRINGFIELD	11,771	8,237	3,609	2,007
SOMERVILLE	10,771	8,710	3,822	2,210
WORCESTER	36,247	22,014	4,921	4,558
ATHOL	1,585	1,309	277	333
BRAINTREE	1,791	1,388	213	387
CHESTER	296	185	43	29
DALTON	661	493	142	140
ENFIELD	228	154	56	34
FRAMINGHAM	2,586	1,955	551	459
GRAFTON	832	677	170	141
HARWICH	580	350	86	64
IPSWICH	932	703	151	195
LEXINGTON	900	684	211	179
MIDDLEBORO	1,499	977	328	188
NORTHBOROUGH	349	271	106	63
ORANGE	1,316	998	152	347
PETERSHAM	207	117	23	30
ROCKPORT	972	730	137	114
STOUGHTON	1,509	1,102	326	203
TISBURY	265	164	25	37
UXBRIDGE	740	632	214	174
WATERTOWN	1,933	1,572	571	371
YARMOUTH	431	330	86	39

Within a few weeks the smaller towns appreciated that, as one of their representatives at the next legislature put it, "they had drawn a gold brick." They found the law applied to the nomination of town officers, in the choice of whom there had never been charges of corruption. They found they had contracted to pay hundreds of dollars apiece for what to them were useless formalities. The legislature, just then convened, was flooded with petitions for the repeal of the law as far as it applied to towns. Sad tales of mistaken voters were told upon the floor of the House. One member stated it to be his belief that half of his townsmen who voted upon the question at all thought they were voting upon local option in the matter of the sale of liquor.

The immediate result of this agitation was the passage of a statute providing that the Luce act should not apply to town caucuses unless the town at a future annual meeting voted in favor of it, and then should not apply to a caucus for town officers unless expressly provided for in the vote. In just two of the 127 towns which voted in 1904 to accept the Luce act is the law in force to-day.

The discontent, however, was not confined to the towns. Several cities found that the old method of choosing candidates was more satisfactory; seven of them have now, after giving the new law a year's trial, through the relief afforded by a new statute, reversed their former decision, and by vote of their citizens decided to return to their old familiar methods. It is said on very good authority that other cities did not dare to place the question whether their earlier vote should be reversed before their electors at the city election this year, because they feared that the people would mistake it for the question as to the sale of liquor and vote the wrong way.

In the midst of the debates in the legislature upon the repeal of the Luce act came the question of the constitutional amendment looking toward direct legislation. The halls of the legislature rang with oratory. Its members were told that in the people lay the source of all power and that in government directly by the people was to be found the safety of the nation. But upon the desks of the members were the petitions of towns for protection against their own short-sighted voters. The argument of practical experience was too strong to be resisted. The proposed amendment was easily defeated. The experiment in legislation by the people had admittedly failed.

What then are the conclusions which can be drawn from the history of direct legislation in this country? Clearly the referendum has its place in all political systems, but it is not the place which those who find in it a panacea for legislative evils would give to it. It is a prompt and decisive method of learning the opinion of the public upon a very simple specific question which comes very near to them and upon which they have a definite opinion before they hear that the question is to be put upon the ballot. Thus a manufacturing community in which

trade union doctrines are familiar might be expected to express itself decisively on a question involving the closed or open shop. If the question asked obviously involves a moral issue, voters will keep their consciences clear by marking their ballots. It is conceivable that at some time a state might become inflamed upon some burning issue to which the legislature remained cold. This is unlikely, because it is the fault of most legislative bodies to follow over-promptly what they believe to be the desires of their constituents. If because of corruption in the legislature or for some other reason such a condition of affairs did happen to exist, a referendum might be a useful method of registering the true public opinion. A petitioner for the change in the Massachusetts constitution said to a committee of the Massachusetts House of Representatives: "Think of a great railroad lease being permitted in this state without the opportunity for the expression by the people upon it." There seems little chance to believe that such an expression would be a helpful one. It may be unfortunate, but it seems to be true, that in this country the average man feels he has done his duty to the state when he has passed upon the merits of two candidates, and he does not turn his mind into the channel of the consideration of particular public measures. As Mr. Lawrence Lowell puts it, an American citizen "is used to passing on men not on measures."

Though the referendum, therefore, may be a fitting instrument to protect the local self-government of municipalities and might conceivably in some great political crisis express the sovereign will of the people, it is not an effective method of creating legislation. The political reformer in a representative government who seeks through the referendum to find a short cut to political purity and ideal law making seems doomed to disappointment. Like many other short cuts it apparently leads into a forest of new complications. Improving a well trodden way is on the whole a more promising use of the practical reformer's energy than cutting new paths. Government by representation is a road that has brought this nation to the land of prosperity. The same reasons which led our forefathers to adopt it as the most satisfactory form of creating legislation

exist to-day. We may think that it is a road which is beset with thorns and weeds and that weeding is not such interesting work as cutting into the forest, but it is a great satisfaction to know that we have a real road and that it is taking us somewhere. Practical political reformation of the representative system, participation at caucuses and primaries, and devoted, self-sacrificing efforts to elect wise and honest legislators are not inspiring labors but they are apparently the most important duties before the American citizen who cares for his country.

W. RODMAN PEABODY.

BOSTON, MASSACHUSETTS.